IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE: JERRY LANE WARREN,	)	
CLARITA HAUMEA WARREN,	)	**CASE NO. 02-2141**
	)	
Debtors.	)	**CHAPTER 13**
	)	
	)	
MIDFIRST BANK,	)	
Movant	)	
	)	
v.	)	**MOTION FOR RELIEF FROM**
	)	**THE AUTOMATIC STAY**
JERRY LANE WARREN,	)	
CLARITA HAUMEA WARREN,	)	
JO S. WIDENER, Trustee	)	
	)	
Respondents.	)	

MEMORANDUM DECISION

The issue in dispute between the parties is the attorney's fee sought by the Movant, Midfirst Bank ("the Bank"), in connection with the resolution of the Motion for Relief from the Automatic Stay ("Motion for Relief") before the Court. The Bank seeks $500 for such fee, which its counsel represents is a "flat" fee charged by his firm and paid by the client to handle such Motions without regard to the actual services which may be needed to resolve them. The effect of such a fee arrangement, of course, is that in some cases the services required might well be less than such fee amount if charged on an hourly basis and in others it might be greater if handled on a time basis. This case has been heard in Abingdon while the office of the Bank's counsel is

located in Norfolk, which are about as far from each other as it is possible to be in the Commonwealth of Virginia. Bank's counsel regularly handles motions for relief on behalf of mortgagee clients in both the Eastern and Western Districts of Virginia Bankruptcy Court and generally appears in this Court for actual hearings through local counsel who it engages for that purpose. It is the Court's observation based on review of a large number of motions for relief and other contested matters which come before the Court that, as a general proposition, the fees charged by attorneys located in large cities in the Eastern District are higher than those generally charged by attorneys located in and ordinarily personally appearing in this District. An indication of that supposition is that the fee sought by Debtors' counsel and approved by the Court for handling the Debtors' Chapter 13 case as set forth in the Court's confirmation order entered in this case on October 17, 2002 was $ 750 while the fee sought by Bank's counsel for handling just the one matter of the Motion for Relief is $500. Counsel for the Debtors objects to the fee sought and argues that $250 is more appropriate for the services actually needed to protect the creditor's interest. The recovery of the $150 filing fee paid to the Clerk for the Motion for Relief is not disputed. Neither is there any dispute about there being sufficient equity in the property to entitle the Bank to recover its attorney's fees if entitled to do so under the loan documentation agreed to by the parties.

The loan documents setting forth the parties' rights and obligations are attached as exhibits to the Motion for Relief. The note executed by the Debtors only appears to provide for the recovery of attorneys' fees when the loan has been accelerated as a result of default and the entire balance declared due. On the other hand, the deed of trust is broader in its scope. It authorizes the note holder, when the property serving as security is involved in a bankruptcy

case, "paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding." One of those rights under the "Security Instrument" is the right to foreclose when contractually due payments have not been made. Because of the existence of the automatic stay in bankruptcy, the mortgagee cannot enforce its foreclosure right without obtaining relief from the stay.

In their Answer to the Motion for Relief, the Debtors admitted that they were two months delinquent in their regular payments at the time the Motion was filed but denied that they were in default to the extent claimed by the Bank. They mailed a check to the Bank prior to the hearing scheduled on the Motion for Relief to bring themselves current and their counsel contacted Bank's counsel in advance of the scheduled hearing to request that the hearing be continued until the client could confirm receipt of payment. This was agreed to and Debtors' counsel appeared at the noticed hearing and advised the Court that the parties were in agreement to continue the hearing for two weeks to see if the Motion might be resolved. Debtors' counsel prepared the order required by the Court to continue the automatic stay and the hearing to the agreed date. At that time counsel for the Debtors and local counsel for the Bank appeared and advised the Court that the parties were in agreement that the Debtors had brought their loan current and that the only issue in dispute between them was the $500 attorney's fee sought by the mortgagee.[1] The Court requested that Bank's counsel submit to the Court a certification of the legal services provided and the necessary professional time for doing so and offered Debtors' counsel the opportunity to comment upon the information so provided.

The certification filed by the Bank's counsel explained that the $500 flat fee

"encompasses all fees incident to preparation, service and pursuit of the particular Motion including all court appearances, review of responsive pleadings, if any, document review of supporting documents provided in connection with each Motion, obtaining and updating, as necessary, payment history information, approximate loan balance and obtaining valuation information incident to the completion of the Movant's Certification filed with each Motion."[2] The certification also provided an itemization of time expended by both the attorney and paralegal assigned to the Motion totaling 3.25 hours. The Bank's counsel estimated an additional .45 hours for preparing an order resolving the Motion should the Court ask the Bank to tender such an order; thus bringing the total time spent on the Motion to 3.70 hours. In addition, filing fees of $150 were advanced to the Bank.

Counsel for the Debtors responded by arguing that since there was no hearing on this Motion as the result of the Debtors bringing the loan current, the Bank should not be able to charge the entire fee. Instead, the Bank's counsel should be fairly and adequately compensated by receiving $250 for attorney's fees and $150 for costs. Debtors' counsel stated that the time entries set forth in the certification appear to be normal and routine matters associated with a Motion for Relief. However, charging .85 hours for preparation to appear at the November 22 hearing is excessive, Debtor's counsel argues because such a hearing is routine and only requires a call to the Bank confirming receipt of the Debtors payment.

While the Court agrees with Debtors' counsel that the fee charged by Bank's counsel is high for the services actually necessary to resolve this particular Motion for Relief, it cannot say based on the range of fees it regularly reviews in such motions generally that a $500

[2] The Bank's counsel filed the Movant's Certification on October 18, 2005.

"flat fee" is an unreasonable arrangement between mortgagees and experienced bankruptcy counsel to handle such matters or that with regard to this particular matter any discrepancy between this amount and the appropriate charge which might have been expected on a pure "time" basis is of such magnitude that it ought to deny the mortgagee the right to recover the fee. There has been no contention made that the filing of the Motion was not justified to protect the mortgagee's interest under the circumstances presented here or that the "flat fee" will not actually be charged to the Bank.

An order in accordance with the provisions of this Memorandum Decision shall be entered contemporaneously herewith.

This 27th day of December, 2005.

UNITED STATES BANKRUPTCY JUDGE